

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE NO. 711 (SUB-NO. 2)

ENTERED
Office of Proceedings
November 7, 2023
Part of
Public Record

RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

OPENING COMMENTS OF CANADIAN PACIFIC KANSAS CITY

The U.S. operating rail carrier subsidiaries of Canadian Pacific Kansas City Limited (collectively, “CPKC”)¹ respectfully submit these opening comments on the Board’s proposed rule addressing the potential use of reciprocal switching orders as a remedy for demonstrated inadequacies in railroad service (“Proposed Rule”).

INTRODUCTION

CPKC agrees that railroad customers should have appropriate remedies in cases where the common carrier rail service they are receiving from the rail carrier that serves them (at origin or destination) is persistently inadequate. Where an alternate carrier can reasonably be expected to remedy the inadequacy – and thus provide at least adequate levels of service – an order giving that carrier access to the customer can provide a beneficial relief valve that restores the shipper’s ability to receive adequate service. Of course, it is essential that the finding that the carrier is providing inadequate service be made based on all the facts. At the same time, the remedy must be carefully tailored to address the found service inadequacy and not overreach. If structured appropriately, the potential availability of such a remedy ought to provide salutary incentives for the incumbent rail carrier to devote the resources and management attention necessary to provide

¹ The U.S. operating rail carrier subsidiaries of CPKC Limited include Soo Line Railroad Company; Central Maine & Quebec Railway US Inc.; Dakota, Minnesota & Eastern Railroad Corporation; Delaware & Hudson Railway Company, Inc.; The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company.

service that does not fall short of adequate and, in cases where service levels have fallen short, to return service to an adequate level promptly.

CPKC is submitting these comments in the spirit of offering constructive suggestions about ways in which the rules could be adjusted to better align with the Board's objective of providing a remedy for demonstrated inadequacies of rail service. These suggestions supplement (and in some cases amplify) those set forth in the Opening Comments of the Association of American Railroads, which CPKC joins. Opening Comments of the Association of American Railroads (filed Nov. 7, 2023) ("AAR Opening Comments").

CPKC is focusing its opening comments in two areas. First, we point out ways that the framework of the Board's Proposed Rule might inadvertently incentivize opportunistic behavior by some shippers (and "alternate" rail carriers) to take advantage of the potential for a switching remedy to improve their access. We offer some suggestions aimed at assisting the Board in ensuring that its Proposed Rule does not encourage opportunistic conduct that would lead to an inappropriate restructuring of the rail network.

Second, we explain how the data-related obligations established by the Board's Proposed Rule will require substantial time and investment for CPKC to be able to provide shippers with prompt access to lane-by-lane service metrics. CPKC's systems – including those used to report data pursuant to the Ex Parte No. 770 requirements – are not set up to generate shipper- and commodity-specific lane-by-lane statistics. Similarly, CPKC's systems are not set up to capture and retain the data, information, and documentation regarding the circumstances giving rise to specific service outcomes, without which CPKC would not be in a position to place those outcomes in proper context, under the Board's proposed "affirmative defenses" or otherwise. To be sure, CPKC monitors its service and takes proactive steps to address service issues as they arise, but until the Proposed Rule there has not been any need to maintain granular, network-wide records of every circumstance that affected each shipper's service levels for potential use in

a litigation setting. CPKC urges the Board to convene a series of technical workshops to enable carriers to better understand the specific data-related requirements of the Rule (as proposed or in some future form), to defer the effective date of any final rule for a period sufficient to enable carriers to put appropriate systems in place, and then to apply the Final Rule only to future service levels that post-date the Rule's effectiveness.

I. THE BOARD SHOULD TAKE STEPS TO AVOID IMPOSING SWITCHING ORDERS THAT OVERREACH THE GOAL OF REMEDYING SERVICE INADEQUACIES

CPKC is concerned that, as currently structured, the Board's Proposed Rule may inadvertently create incentives for some railroad customers opportunistically to seek – and for the Board potentially to award – switching orders that overreach the legitimate objective of providing a targeted and proportional remedy for demonstrated railroad service inadequacies.

As the Board no doubt understands, and as history shows, in some cases shippers (or other railroads working through a shipper) will be motivated to seek service from an alternate carrier whether or not the service they are receiving from the incumbent is inadequate. In the words of the seminal *Jamestown* case, switching orders are not in the public interest when service is adequate and the proposed additional service, while “desirabl[e]” from the shipper's standpoint, is not necessary.² The AAR Opening Comments address a number of ways in which the Board's Proposed Rule should be adjusted – both in the identification of the service outcomes as to which a potential switching order might be imposed and in the breadth and duration of any such remedy – to better align the rule with its goal of remedying service inadequacies. As those comments point out, the Board should (a) evaluate available data to set

² *Jamestown N.Y. Chamber of Commerce v. Jamestown, Westfield & Nw. R.R.*, 195 I.C.C. 289, 292 (1933). Jamestown relied in part on the ICC's earlier determination in the York Manufacturing case that switching orders were not justified unless there was a “showing that the shippers are *so inadequately served* at present that [the agency is] warranted, from the standpoint of the public interest, in depriving the carrier first on the ground of an important volume of the traffic.” *Manufacturers Association of York, PA v. Pennsylvania R.R.*, 73 I.C.C. 40, 50 (1922) (emphasis added).

the Rule's thresholds at levels that take into account the distribution of normal rail service outcomes, (b) revise the Rules to make clear that the Board will consider all circumstances that may affect the service outcomes experienced by a particular shipper for a particular "lane" of traffic at a particular time; and (c) consider changes that ensure that any switching order the Board might issue is tailored in scope and duration to the particular facts of the inadequacy it is seeking to remedy.³

The framework of the Proposed Rule has great promise as a mechanism for remedying demonstrated service inadequacies – and in the process also providing added incentives for carriers to provide adequate service in the first place. But it is vital that the Board's design of the particulars of the Proposed Rule consider not solely the goal of enabling switching remedies in the right cases, but also the imperative of avoiding the adverse impacts for the rail network of a set of rules that goes too far and unnecessarily regulates service – or worse, leads to switching orders that fundamentally restructure the industry.

CPKC was not among the larger Class 1s that experienced significant and persistent service problems in the recent past. CPKC understands that its success as a transportation service provider depends critically not only providing adequate service but also meeting or exceeding its customers' needs and expectations, and it strives to maintain laser focus on executing the high-quality operations needed to deliver on this goal. But CPKC also understands that it is intrinsic to railroad network operations that service outcomes – even on the best-designed and best-run network – will vary for innumerable reasons not always within the control of the carrier.

³ AAR Opening Comments at §§ IV.D & IV.H (addressing, *e.g.*, the need to set thresholds at appropriate levels taking into account the distribution of normal rail service outcomes, the importance of considering all circumstances that may affect the service outcomes experienced by a particular shipper traffic lane, and the desirability of tailoring the scope and duration of any switching order to the particular facts of the inadequacy it is imposed to remedy).

CPKC’s own experience shows that even a well-functioning railroad providing excellent service – and meeting high standards overall for metrics like on-time performance, transit time, and first mile-last mile execution – will deliver service outcomes for some individual customers, for some lanes, for some period of time, that fall short of system-wide averages. To a significant extent, this is just because of the nature of railroading: these kinds of service outcome metrics are variable across shippers, across lanes, and across time, such that roughly half of all outcomes will be “below average.” These variations occur for innumerable hard-to-identify reasons, including most prominently random variations associated with the vagaries of operating a complex network serving innumerable other flows of traffic across a multitude of network nodes and in an outdoor environment affected by weather and other variables.

An examination of the real-world distribution of railroad service outcomes would reveal this phenomenon. CPKC’s very preliminary examination of its own performance against the transit time metric incorporated in the Proposed Rule suggests that during a period in summer 2023 when CPKC’s overall transit time performance was consistent with CPKC’s normal level of service performance, as much as one fifth of lanes may at any given time reflect transit times that – for one reason or another – were sufficiently longer than during the same period a year ago to trigger a potential switching order under the Proposed Rule. From CPKC’s perspective, switching orders arising from this record would be inappropriate. CPKC’s service is not perfect in every case, but it is simply not the case that one fifth of CPKC’s service outcomes are “inadequate” under any standard.

To avoid imposing switching orders in circumstances that merely reflect the normal and inherent variability in railroad common carrier service, CPKC urges the Board, first, to examine available data on actual railroad service outcomes – including those delivered by carriers (like CPKC) whose overall level of service is high – and to calibrate the metric triggers in a manner that appropriately targets situations where there is a true inadequacy worthy of further

examination. Second, the Board should revise its Proposed Rule to ensure that it does not in individual cases leap to the conclusion that a mere “metric failure” (however calibrated) necessarily reflects a service inadequacy that warrants a switching remedy. All facts and circumstances must be considered to determine whether there is an actual service inadequacy that warrants regulatory intervention. And finally, the Board should ensure that the scope and duration of any switching is tailored to the remedial aims of the rule.

The importance of confining switching orders to the remedial goals outlined in the Board’s Proposed Rule is especially acute in contexts where a shipper (or a potential alternate carrier working with the shipper) will have incentives to seek an order providing switching access to improve upon the status quo in ways unrelated to the service that shipper is receiving. AAR Opening Comments at § III.B. CPKC is particularly attentive to a set of scenarios that is touched upon only in passing by the AAR Opening Comments: namely, circumstances where the incumbent’s line-haul service is limited to a relatively short haul to or from an intermediate interchange point, whereas the alternate carrier’s network could become a longer or even single-line haul all the way to the destination (or from the origin) if it were granted access via a switching order. The shipper’s motivation in such a case may not be to remedy inadequate service but to *improve upon* pre-switching conditions by replacing an interline move with a single-line move. AAR Opening Comments at § IV.D.7, footnote 10.

Circumstances of this sort undoubtedly could arise on every Class 1 railroad’s network, since every rail carrier’s network has limitations on the geographies it can serve directly. However, CPKC is differently situated because of its relatively small size as compared to the other much larger Class 1s, coupled with CPKC’s generally north-south orientation within the United States. No matter how good CPKC’s service may be, some shippers will crave direct access via larger Class 1 (alternate) carriers to and from points reached by their broader networks blanketing the Western and Eastern United States. Those unique facts raise the concern that,

unless the Board's award of switching orders is rigorously confined to situations where service is truly inadequate and those orders are limited as much as possible to remedy the demonstrated inadequacy, the regime of the Proposed Rule could jeopardize CPKC's traffic base. And it would do so asymmetrically, because there likely would be few if any comparable countervailing opportunities for CPKC to offer service to shippers via an extended haul for traffic as to which CPKC might be deemed an "alternate" carrier under a switching order. And the concern is magnified by the very real potential that the Board's Proposed Rule would lead to switching orders lasting many years – or even perpetually – meaning that every new order would create a ratchet-like creep towards near-universal open access within terminal areas.

Were the Board's switching rules to lead to such an outcome they would broadly restructure the network in ways that favor further growth by the carriers with the largest and farthest-reaching U.S. networks while handicapping the ability of smaller carriers like CPKC to continue to make the investments needed to compete aggressively. That result would be unfortunate and inappropriate.⁴

CPKC is a strong proponent of the benefits of single-line service for rail customers, but those benefits should be realized through carrier investments – like the CP/KCS transaction – that enable the *real expansion* of competitive rail routing options. A switching regime that became a vehicle for denying the incumbent carrier "first on the ground of an important volume of the traffic"⁵ would provide a windfall to the shipper and the alternate carrier and would undermine the incumbent's ability and incentive to invest in its own competitive initiatives and service improvements.

⁴ *Baltimore Gas & Electric v. United States*, 817 F.2d 108, 114-115 (D.C. Cir. 1987) (agency may not impose switching to restructure the industry or force the creation of through routes).

⁵ *See Manufacturers Association of York*, 73 I.C.C. at 50.

This is not the only context in which shippers and alternate carriers might be incentivized to seek switching orders for reasons unrelated to the narrow objective of remedying true service inadequacies.⁶ Shippers might also seek such orders opportunistically as a way to restructure their available rail options or to gain leverage in rate negotiations, and alternate carriers may be highly motivated to expand their direct shipper access.⁷ This potential underscores the importance of modifying the generally applicable aspects of the Proposed Rule in ways – many suggested above and in the AAR Opening Comments (at § III) – that tether them as tightly as reasonably possible to the goal of remedying service inadequacies.

Regarding the particular context addressed above, where a shipper may be incentivized to convert an interline service to single-line service provided by a larger alternate carrier, CPKC notes that the concern provides an additional basis for AAR’s recommendation that the Board defer application of the Proposed Rule to interline traffic (in this context, meaning traffic interchanged between carriers that are not part of the same commonly-controlled network) until the issues associated with applying the Rule in that context are better understood. AAR Opening Comments at § IV.D.9.

To the extent that the Rule is eventually applied to interline movements, CPKC also urges the Board to evaluate mechanisms that might be deployed to avoid providing shippers (or their proposed alternate carriers) with a windfall that effectively bypasses the incumbent carrier’s network in a quest to replace interline service with single-line service through a switching order.

⁶ The Board’s Proposed Rule aptly observes, a number of the participants in the Sub-No. 1 docket “sought reciprocal switching relief as part of the acquisition of Kansas City Southern and its railroad affiliates by Canadian Pacific Railway Limited.” Proposed Rule at n.4. None of those requests was linked to any showing of inadequate service, and each was rejected as lacking merit. *CP/KCS*, Finance Docket No. 36500 (STB served Mar. 15, 2023) at 83-85.

⁷ The Board must also guard against the use of these procedures by a customer simply to achieve lower rail rates, which is an inappropriate use of this statute. *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1502 (D.C. Cir. 1988) (agency may not order reciprocal switching for purposes of providing rate relief).

CPKC sees merit in two potential mechanisms that could be applied when the incumbent handles traffic only for a minority of the origin-to-destination routing: limiting the eligibility of certain alternate carriers and limiting the duration of the switching order. Both could be implemented in a manner that preserved the central feature and purpose of the Board's rule as a service remedy while minimizing the potential for overreach:

- The first approach would disqualify a proposed alternate carrier from switching access if (a) the incumbent serves only a minority of full origin-to-destination route, (b) the alternate carrier's network would serve the entire origin-to-destination route after being granted switching access, and (c) the alternate carrier is not the only other Class 1 carrier serving the pertinent terminal. In this context, an order granting access to an alternate carrier that does not serve the entire origin-to-destination route would not provide the same windfall that improves the shipper's pre-order conditions for reasons unrelated to service inadequacies.
- The second approach could be applied in cases where the only available alternate carrier would serve the entire route after being granted switching rights, but the Board concludes that a switching order is nonetheless warranted to remedy a demonstrated service inadequacy. In those situations, the Board should avoid an overreaching restructuring of the shipper's rail service options by *limiting the duration of the order* to that necessary to enable the incumbent to demonstrate that it can provide adequate service. An appropriate limit might be that the order is effective initially for three months, during which time the incumbent would be entitled to demonstrate that its service had risen to an adequate level thereby terminating the alternate carrier's access.

II. THE BOARD SHOULD ALLOW CARRIERS TIME TO DEVELOP THE SPECIFIC DATA CAPABILITIES REQUIRED TO COMPLY WITH THE PROPOSED RULE

The Proposed Rule contemplates the intensive use of carrier data. Although the service metrics proposed by the Board build upon aggregate data that is reported in other proceedings,⁸ the Proposed Rule would represent the first time that railroads need to report and make available on demand within a very short timeframe granular lane-by-lane statistics relating to these metrics. The Board recognizes that the new “data access and standardization provisions . . . have no equivalent in the previous proposal.” Proposed Rule at 5. The Proposed Rule likewise would represent the first time that carriers’ performance in accord with such metrics – much less the granular lane-by-lane statistics called for by the Proposed Rule – would provide a potential trigger for material regulatory consequences or would be needed by the incumbent carrier to defend itself in potential switching order proceedings.

With this context in mind, CPKC offers four constructive thoughts on data issues. *First*, because the lane-by-lane reporting contemplated by the Proposed Rule is entirely new, railroads like CPKC will need time to modify their systems (and build new systems) to support the new reporting and response obligations. The appropriate amount of time will depend on the Board’s determinations on the content of any final rule. The Board’s proposal so far only states that reporting will be “in a manner and form determined by the Board.” Proposed Rule at 44 (proposed 49 C.F.R. 1145.8(b)). Carriers have some experience with OETAs under the Board’s demurrage rule, but they lack similar experience with the specific definition of OETA in the Proposed Rule. Similarly, applying the Proposed Rule to interline traffic would raise significant complications that would not arise if the Board decided to proceed incrementally, starting first

⁸ See, e.g., *U.S. Rail Serv. Issues – Performance Data Reporting*, Ex Parte No. 724 (Sub-No. 4) (STB served Nov. 30, 2016); *Urgent Issues in Freight Rail Serv. – R.R. Reporting*, Ex Parte No. 770 (Sub-No. 1) (STB served May 6, 2022); *Urgent Issues in Freight Rail Serv. – R.R. Reporting*, Ex Parte No. 770 (Sub-No. 1) (STB served May 2, 2023).

with single-line traffic. However the Board resolves those and other issues, some amount of time will be needed for carriers to implement a rule of this novelty and breadth effectively and efficiently.

In the limited time provided to evaluate the implications of the Proposed Rule, CPKC has made a good faith effort to examine its own systems with an eye toward what would ultimately be required if the Board moves forward with the Proposed Rule. Unique to CPKC is the challenge of preparing to comply with the Proposed Rule at a time when the separate rail carriers that are part of the CPKC network continue to maintain separate systems that have yet to be fully integrated. In CPKC's judgment, its systems (both at legacy CP/Soo and KCSR) will require modification to be able to provide petitioners the data on a lane-specific basis from different 12-week periods in the way the Proposed Rule contemplates. Proposed Rule at 13. CPKC respectfully requests that the Board take into consideration that it will take some time to develop systems that generate the data in the way that would be required and provide adequate time after issuance of a final rule for that development to take place before the rule becomes effective.⁹

Second, and relatedly, the Board should consider the need carriers will have to capture and maintain additional service-related data that may be necessary to enable the Board to evaluate the true causes of potential service inadequacies suggested by metric failures, and for the incumbent carriers to have a fair opportunity to defend themselves against proposed switching orders. As noted above, CPKC does not today have in place the systems necessary to record and maintain data on the myriad factors that can influence service outcomes, or to link

⁹ The Board has taken similar considerations into account when imposing new disclosure requirements on carriers. *See, e.g., Released Rates of Motor Common Carriers of Household Goods*, Docket No. RR 999 (Amendment No. 5) (STB served Mar. 9, 2012) at 2-3 (extending by six weeks the original three month period from issuance of decision to effectiveness, even where new disclosure rules created no "major conflicts" with existing brochures, "in order to provide additional time for affected parties to come into compliance, and in order to allow consumers to benefit from the changes as soon as possible").

those factors to the specific metrics that might give rise to a switching order proceeding. That is so even as to just the (overly-) narrow circumstances that underlie the specific affirmative defenses set forth in the Proposed Rule. Proposed Rule at 25-26 (data could include information related to unforeseen track outages stemming from natural disasters, severe weather events, flooding, accidents, derailments, and washouts as well as written notices of shipment surges). To date, CPKC's approach to meeting the service needs of its customers has been to stay attuned to all of the real-world circumstances affecting network operations and address potential issues proactively to avoid and resolve adverse impacts in real-time. This highly dynamic real-world, real-time resolution of operational challenges (the facts of which would typically support an affirmative defense) is not easily captured by systems or represented by data. Developing the systems necessary to litigate switching order cases before the Board will require a different focus, and one that CPKC and other railroads will inevitably need time to implement.

Third, CPKC is proud to say that it (and its constituent carriers prior to the CP/KCS combination) has in general been providing very good and consistent service in the United States. Nevertheless, as discussed above, CPKC knows that its data would reveal variation in the metric-based service outcomes realized by individual customers. Under the Proposed Rule, those variations could well become actionable for the first time. The Board should be cautious about applying the new regime to a carrier's service performance until the carrier has had some time to accumulate experience with the Rule's contemplated use of lane-specific metrics and – if necessary – to make adjustments aimed at increasing the prospects of staying on the right side of the Rule's thresholds. A rule that did not allow such an opportunity to adjust would raise fundamental fairness concerns. *See Nat'l Min. Ass'n v. U.S. Dep't of Interior*, 177 F.3d 1, 8 (D.C. Cir. 1999) (“The rule against retroactivity is” violated if “[a]n administrative rule . . . creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.”).

Fourth, CPKC urges the Board to consider undertaking a series of technical workshops at which Board Staff, the carriers, and other interested parties could come together to discuss the many technical aspects of the Rule's design and potential implementation. A technical conference with Board Staff before the Proposed Rule is finalized – and a sufficient period before any final rule becomes effective – could both assist in the Board's design of a rule capable of practical, efficient and consistent implementation, and assist carriers in developing the specific technical capabilities necessary to support such implementation.

Among the many issues that might warrant discussion at such a conference (*see* AAR Opening Comments at §§ II.C, IV.I.1. CPKC has particular interest in two that bear directly on its own implementation of the Proposed Rule:

- Precisely how the metrics underlying the Proposed Rule should be calculated for traffic flowing across international boundaries? For U.S. traffic with an ultimate origin or destination within Mexico, KCSR's systems treat the Mexican border as the origin/destination and calculate OETAs and transit times just for the U.S. portion of the move. By contrast, legacy CP systems are not set up to consider the Canadian border as an origin/destination for traffic moving on the CP network between the United States and Canada. Investments would be required to generate OETA or transit time metrics for just the U.S. portion of these movements.
- Will the Rule accommodate varying approaches to the generation of network-wide metrics? CPKC understands the Board's Proposed Rule to contemplate that the metrics underlying the Rule would be generated for the entire movement

across a commonly-controlled rail network.¹⁰ However, CPKC has not yet fully integrated its legacy CP and legacy KCSR systems to support the systematic generation of OETAs or calculation of transit times across the entirety of CPKC's network, and CPKC has consciously chosen to take a deliberate course in completing that integration so as to avoid any possibility of service disruptions.¹¹

CONCLUSION

CPKC appreciates the Board's thoughtful and continuing approach in its attempt to devise an appropriately calibrated remedy for instances where railroads fail to provide adequate common carrier service. CPKC urges the Board to consider the constructive suggestions offered here and in the AAR's Opening Comments, and CPKC looks forward to further participation in this proceeding as the Board's proposal evolves.

¹⁰ See, e.g., Proposed Rule at 17 ("reliability standard in part 1145 would separately apply to a subsequent rail carrier as to its portion of the trip, when the subsequent carrier *or its affiliated company* moved the shipment to its final destination in a terminal area") (emphasis added).

¹¹ See *CP/KCS*, Finance Docket No. 36500, Merger Application, Verified Statement of James Clements at ¶¶ 14-18 (filed Oct. 29, 2021) ("To ensure a safe and efficient transition, we plan to continue to use each railroad's existing systems for an initial period following the Control Date. ... During the second and third years following approval of the transaction shipment functions will be moved in to centralized CPKC systems.").

Respectfully submitted,



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November 7, 2023